CHAPTER 6

CONTRACT REMEDIES

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The United States does not stand on the same footing as an individual in a suit to annul a deed or lease obtained from him by fraud. . . . The financial element in the transaction is not the sole or principle thing involved. This suit was brought to vindicate the policy of the Government. . . . The petitioners stand as wrongdoers, and no equity arises in their favor to prevent granting the relief sought by the United States. Pan Am. Petroleum and Transp. v. United States, 273 U.S. 456, 509 (1927).

I. INTRODUCTION.

A. Government Policy.

1. Department of Defense (DOD) policy requires the coordinated use of criminal, civil, administrative, and contractual remedies in suspected cases involving procurement fraud. See U.S. DEPT OF DEFENSE, DIR. 7050.5, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES (7 June 1989); U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION, 19 Sept. 1994; U.S. DEP'T OF AIR FORCE, DIR. 51-11, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO AIR FORCE PROCUREMENT MATTERS, 21 Oct. 1994; U.S. DEP'T OF NAVY, INST. 5430.92A, OP-008, ASSIGNMENT OF RESPONSIBILITIES TO COUNTERACT FRAUD, WASTE, AND RELATED IMPROPRIETIES WITHIN THE DEPARTMENT OF THE NAVY, (20 Aug. 1987); .

2. Department of Justice (DOJ) policy requires the coordination of parallel criminal, civil, and administrative proceedings so as to maximize the government's ability to obtain favorable results in cases involving procurement fraud. See U.S. DEP'T OF JUSTICE, U.S. ATT'YS MAN. Ch. 1-12.000 (Coordination of Parallel Criminal, Civil, and Administrative Proceedings) June 1998.

3. Among the many remedies available, contractual remedies are a potentially powerful weapon in the government's battle against procurement fraud.

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B. Historical Right

1. Under common law, where a party to a contract committed an act of fraud affecting a material element of the contract, the fraudulent act constituted a breach on the part of the party committing the act. The innocent party could then, at its election, insist on continuation of contract performance, or void the contract. Once voided, the voiding party would be liable under equity to the other party for any benefit received. Stoffela v. Nugent, 217 U.S. 499 (1910); Diamond Coal Co. v. Payne, 271 F. 362, 366 (App. D.C. 1921) ("equity refuses to give to the innocent party more than he is entitled to").

2. Since the U. S. government was often viewed as acting in a "commercial capacity" when it engaged in commercial transactions, the rules of common law and equity applied to resolution of disputes. As such, if the government sought to rescind a contract, it was obligated to restore the contractor to the position it would be in, but-for the breach. Cooke v. United States, 91 U.S. 389, 398 (1875) ("If [the government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there."); Hollerbach v. United States, 233 U.S. 165 (1914); United States v. Fuller Co., 296 F. 178 (1923).

3. The Supreme Court rejected the general rule that the government should be treated like any other party to a contract when fraud. Pan American Petroleum and Transport Co., v. United States, 273 U.S. 456 (1927).

4. Courts and boards have developed an implied or common-law right to terminate or cancel a contract in order to effectuate the public policy in a statute or regulation. See United States v. Mississippi Valley Generating Co., 364 U.S. 520, reh'g denied 365 U.S. 855 (1961); Four-Phase Sys., Inc., ASBCA No. 26794, 86-2 BCA ¶ 18,924.

5. A contractor that engages in fraud in dealing with the government commits a material breach, which justifies terminating the entire contract for default. Joseph Morton Co., Inc. v. United States, 3 Cl. Ct. 120 (1983), aff'd 757 F.2d 1273 (Fed. Cir. 1985).

II. CONTRACTING OFFICER AUTHORITY.

A. Actions Clearly Exceeding Authority. The Contract Disputes Act, 41 U.S.C. § 605(a), as implemented by FAR 33.210, prohibits any contracting officer or agency head from settling, paying, compromising or otherwise adjusting any claim involving fraud.

B. Actions Clearly Within KO Authority.

1. Refusing Payment. It is the plain duty of administrative, accounting, and auditing officials of the government to refuse approval and to prevent payment of public monies under any agreement on behalf of the United States as to which there is a reasonable suspicion of irregularity, collusion, or fraud, thus reserving the matter for scrutiny in the courts when the facts may be judicially determined upon sworn testimony and competent evidence and a forfeiture declared or other appropriate action taken. To the Secretary of the Army, B-154766, 44 Comp. Gen. 111 (1964).

2. Suspend Progress Payments. 10 U.S.C. § 2307(e)(2); Brown v. United States, 207 Ct. Cl. 768, 524 F.2d 693 (1975); Fidelity Construction, DOT CAB No. 1113, 80-2 BCA ¶ 14,819.

3. Withhold Payment.

4. When a debarment/suspension report recommends debarment or suspension based on fraud or criminal conduct involving a current contract, all funds becoming due on that contract shall be withheld unless directed otherwise by the Head of the Contracting Activity (HCA) or the Commander, U.S. Army Legal Services Agency. AFARS 9.406-3.

a. Labor standards statutes provide for withholding for labor standards violations. WHA – 41 U.S.C. § 36; DBA – 40 U.S.C. § 276a-2; SCA – 41 U.S.C. § 353(a).

b. Specific contract provisions may provide for withholding (e.g., service contract deductions for deficiencies in performance).

5. Terminate Negotiations. FAR 49.106 (terminate settlement discussions regarding a terminated contract upon suspicion of fraud); K&R Eng'g Co., Inc., v. United States, 222 Ct. Cl. 340, 616 F.2d 469 (1980).

6. Determine Contractor to be Nonresponsible. FAR Subpart 9.4.

III. CONTRACTUAL REMEDIES.

A. Denial of Claims.

1. Section 605(a) of the CDA prohibits an agency head from settling, compromising or otherwise adjusting any claim involving fraud. 41 U.S.C.S § 605(a) (LEXIS 2002). This limitation is reflected in FAR 33.210, which states that the authority of a contracting officer to decide or resolve a claim does not extend to the "settlement, compromise, payment, or adjustment of any claim involving fraud." Subpart 33.209 of the FAR further provides that contracting officers must refer all cases involving suspected fraud to the agency official responsible for investigating fraud.

2. As a practical matter, the term "denial" is a misnomer in that the contracting officer is precluded from making a final decision on a contractor's claim where fraud is suspected. As such, denial of a claim consists simply of doing nothing with the claim while other courses of action are pursued.

3. Denial of a claim should be viewed as simply the first of possibly many steps in the resolution of a fraudulent claim.

B. Counterclaims Under the CDA

1. IAW 41 U.S.C. § 604 (LEXIS 2002): "[i]f a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim."

2. This provision of the CDA has been applied in only a small number of cases. This may in part be due to the deterrent effect of this statute. See United States ex. ral. Wilson v. North American Const., 101 F. Supp.2d 500, 533 (S.D. Tex 2000) (district court unwilling to enforce 41 U.S.C. § 604, in part because there were "very few cases applying 41 U.S.C. 604").

3. It is not possible to enforce this section of the CDA in litigation before the boards because of the language at 41 U.S.C. Section 605 (a), which states: "[t]he authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle or determine." The boards have generally interpreted this language as meaning only Department of Justice (DOJ) has the authority to initiated a claim under this provision. This is because (in the eyes of the boards) only DOJ has the authority to administer or settle disputes involving fraud under the current statutory scheme. See TDC Management, DOT BCA 1802, 90-1 BCA ¶ 22,627.

C. Default Terminations Based on Fraud.

1. Where a contractor challenges the propriety of a default termination before a court or board, the government is not precluded under the CDA from introducing evidence of fraud discovered after the default termination, and using that evidence to support the termination in the subsequent litigation.

2. Some grounds for default termination.

a. Submission of falsified test reports. Michael C. Avino, Inc., ASBCA No. 317542, 89-3 BCA ¶ 22,156.

b. Submission of forged performance and payment bonds. Dry Roof Corp., ASBCA No. 29061, 88-3 BCA ¶ 21,096.

c. Submission of falsified progress payment requests. Charles W. Daff, Trustee in Bankruptcy for Triad Microsystems, Inc. v. United States, 31 Fed. Cl. 682 (1994).

D. Voiding Contracts Pursuant to FAR 3.7

1. Subpart 3.7 of the FAR establishes a detailed mechanism for voiding and rescinding contracts where there has been either a final conviction for illegal conduct in relation to a government contract, or an agency head determination of misconduct by a preponderance of the evidence.

2. Subpart 3.7 of the FAR cites three specific authorities that empower the government to void or rescind contracts in instances of procurement fraud. They are:

   (1) 18 U.S.C. § 218, (LEXIS 2000);

   (2) Executive Order 12448, 50 Fed. Reg. 23,157 (May 31, 1985); and,

   (3) Subsection 27(e)(3) of the Office of Federal Procurement Policy Act (41 U.S.C.S. § 423 (LEXIS 2002)).

3. Under this FAR provision, a federal agency shall consider rescinding a contract upon receiving information that a contractor has engaged in illegal conduct concerning the formation of a contract, or there has been a final conviction for any violation of 18 U.S.C. §§ 201-224.

4. The decision authority for this provision is the agency head, which for DOD has been delegated to the Under Secretary of Defense (Acquisition, Technology, and Logistics).

5. No recorded cases of this provision of the FAR being applied.

E. Suspending Payments Upon a Finding of Fraud, FAR 32.006.

1. FAR 32.006 allows an agency head to reduce or suspend payments to a contractor when the agency head determines there is "substantial evidence that the contractor's request for advance, partial, or progress payments is based on fraud."

2. The authority of the agency head under this provision may be delegated down to Level IV of the Executive Schedule, which for the Department of the Army is the Assistant Secretary of the Army for Acquisition, Logistics, and Technology (ASA (ALT)).

3. This provision of the FAR is a potentially powerful tool in that the government can stay payment of a claim without the danger of a board treating the claim as a deemed denial, thus forcing the government into a board proceeding before the government's case can be developed.

4. Only one recorded board decision involving this provision of the FAR. TRS Research, ASBCA No. 51712, 2001-1 BCA ¶ 31,149 (contracting officer suspended payment on invoices pending completion of an investigation involving fraud allegation, but failed to seek written permission from the agency head to take such act; ASBCA found the government in breach of the contract and sustained the appeal).

F. Voiding Contracts pursuant to the Gratuities Clause, FAR 52.203-3.

1. Allows DOD to unilaterally void contracts upon an agency head finding that contract is tainted by an improper gratuity. Decision authority for the Department of the Army has been delegated to the ASA (ALT).

2. Authority stems from 10 U.S.C. § 2207, which requires the clause in all DOD contracts (except personal service contracts).

3. Considerable due process protections for the contractor.

4. Exemplary damages of between three to ten times the amount of the gratuity.

5. Procedures used very effectively in response to a fraudulent bidding scheme centered out of the Fuerth Regional Contracting Office, Fuerth, Germany. See Schuepferling GmbH & Co., ASBCA No. 45564, 98-1 BCA ¶ 29,659; ASBCA No. 45565, 98-2 BCA ¶ 29,739; ASBCA No. 45567, 98-2 BCA ¶ 29,828; Erwin Pfister General-Bauunternehmen, ASBCA Nos. 43980, 43981, 45569, 45570, 2001-2 BCA ¶ 31,431; Schneider Haustechnik GmbH, ASBCA Nos. 43969, 45568, 2001 BCA ¶ 31,264. See also Colonel Roger Washington, German Bribery Cases: Convicted German Contractor Loses Appeals to Recover Offsets, PROCUREMENT FRAUD UPDATE May 1998.

IV. RELATED REMEDIES

A. Use of Inspection Clause Rights.

1. Provisions include: FAR 52.246-2 (fixed-price supply); FAR 52.246-4 (fixed-price service); FAR 52.246-12 (fixed-price construction); FAR 52.246-3 (cost reimbursement supply); FAR 52.246-5 (cost reimbursement service).

2. General Inspection Clause Requirements. FAR Subpart 46.2.

   a. Contractor required to maintain an inspection system acceptable to the government. David B. Lilly Co., ASBCA No. 34678, 92-2 BCA ¶ 24,973.

   b. Government right to inspect work performed during the course of performance or before acceptance.

   c. Government right to require correction, replacement or rework of nonconforming tenders or to equitably reduce the contract price based on the decreased value of the nonconforming work.

   d. Government rights to perform correction, replacement, or rework, at the contractor's expense or to default terminate the contract if the contractor fails to perform directed corrective work.

3. Government's inspection test must be reasonable. Al Johnson Constr. Co., ENG BCA No. 4170, 87-2 BCA ¶ 19,952; General Time Corp., ASBCA No. 22306, 80-1 BCA ¶ 14,393; Nash Metalware Co. v. Gen. Servs. Admin., GSBCA No. 11951, 94-2 BCA ¶ 26,780.

4. Government Remedies Prior to Acceptance.

5. Nonconforming goods tendered within the delivery period.

   a. Reject the nonconforming goods.

   b. Accept nonconforming goods at a reduction in price.

   c. Require correction/replacement – must give contractor notice of defects and reasonable time to cure. Trataros Constr. Co., Inc., ASBCA No. 42845, 94-1 BCA ¶ 26,592.

6. Nonconforming goods delivered on required delivery date.

   a. Terminate for default if performance is not in substantial compliance with contract requirements.

   b. Accept nonconforming goods at a reduction in price. Federal Boiler Co., ASBCA No. 40314, 94-1 BCA & 26381.

   c. Require correction/replacement – must give contractor notice of defects and reasonable time. Andrews, Large & Whidden, Inc. and Farmville Mfg. Corp., ASBCA No. 30060, 88-2 BCA ¶ 20,542.

7. Nonconforming goods delivered on the required delivery date and which are in substantial compliance with contract requirements.

   a. Cannot terminate for default. Radiation Tech., Inc. v. United States, 366 F.2d 1003 (Cl. Ct. 1986).

   b. Must allow reasonable time to correct defects. Id.

c. Accept Nonconforming goods at reduction in price.

8. Nonconforming goods which the contractor has failed to correct or replace after a reasonable time.

a. Government may correct or replace defective items.

b. Government may contract with another contractor to correct or replace. Lenoir Contractors, Inc., DOTCAB No. 78-7, 80-2 BCA ¶ 14,459.

c. Terminate for default. Radiation Tech., Inc., supra.

9. Providing notice to the contractor.

a. Should be in writing.

b. Specify why goods/services are nonconforming.

c. Not required to inform contractor that fraud is suspected—coordinate to ensure fraud investigation is not adversely affected.

10. Remedies After Acceptance.

a. Revocation of acceptance for fraud.

(1) Elements of proof. Dale Ingram, Inc., ASBCA No. 12152, 74-1 BCA ¶ 10,436.

(a) Intent to deceive;

(b) A misrepresentation;

(c) Must be misrepresentation of fact, not of law, opinion, or judgment; and

(d) Government reliance on the misrepresentation to its detriment.

(2) No ASBCA jurisdiction over this remedy. 41 U.S.C. §§ 605 and 607.

b. Revocation of acceptance for gross mistake amounting to fraud.

(1) "Constructive" fraud as opposed to actual fraud. Catalytic Eng'g & Mfg. Corp., ASBCA No. 15257, 72-1 BCA ¶ 9,432; Kaminer Constr. Corp. v. United States, 488 F.2d 980 (Ct. Cl. 1973); Z.A.N. Co., ASBCA No. 25488, 86-1 BCA ¶ 18,612.

(2) Elements of proof are the same as for actual fraud except no need to prove intent to deceive. Must show a major mistake so serious that it would not be expected of a reasonable contractor.

(3) ASBCA has jurisdiction over this remedy. Z.A.N. Co., supra.

B. Exercise of Warranty to Correct Fraudulent Defect

1. Applicable provision: FAR 46.7.

2. Elements of Proof.

a. There is a defect.

b. The defect is within the scope of the warranty. S. Kane & Sons, Inc., VACAB No. 1316, 78-1 BCA ¶ 13,300.

c. The warranted defect was the most probable cause of the failure. R.B. Hazard, Inc., ASBCA No. 41061, 91-2 BCA ¶ 23,709; A.L.S. Elec. Corp., ASBCA No. 23128, 82-2 BCA ¶ 15,835.

d. The defect arose during the warranted period. Phoenix Steel Container Co., ASBCA No. 9987, 66-2 BCA ¶ 5814.

e. The contractor received the required notice under the warranty clause. Mercury Chem. Co., ASBCA No. 12554, 69-1 BCA ¶ 7730.

3. Remedies for Breach of Warranty. FAR 46.706(b)(2).

a. Correction or replacement of defective work.

b. Price reduction for lost value.

c. Correction or replacement of the work by another contractor or the government at the contractor's expense.

V. BOARD OF CONTRACT APPEALS' TREATMENT OF FRAUD.

A. Jurisdiction.

1. Theoretically, the boards are without jurisdiction to decide appeals tainted by fraud

a. Under the CDA, "[e]ach agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal." 41 U.S.C. § 607(d) (LEXIS 2002).

b. Because the CDA precludes contracting officers from issuing final decisions where fraud is suspected, and the boards only have jurisdiction over cases that can be decided by a contracting officer, the boards are effectively barred from adjudicating appeals involving fraud. See 41 U.S.C. § 605(a) (LEXIS 2002).

2. As a practical matter, the boards exercise a form a de facto jurisdiction in that a finding of fraud is often dispositive of the entire appeal

B. Dismissals, Suspensions and Stays.

1. Government must demonstrate that the possibility of fraud exists or that the alleged fraud adversely affects the Board's ability to ascertain the facts. Triax Co., Inc., ASBCA No. 33899, 88-3 BCA ¶ 20,830.

2. Mere allegations of fraud are not sufficient. General Constr. and Dev. Co., ASBCA No. 36138, 88-3 BCA ¶ 20,874. Four-Phase Systems, Inc., ASBCA No. 27487, 84-1 BCA ¶ 17,122.

3. Boards generally refuse to suspend proceedings except under the following limited circumstances:

a. When an action has been commenced in a court of competent jurisdiction, by the handing down of an indictment or by filing of a civil action complaint, so that issues directly relevant to the claim before the board are placed before that court;

b. When the Department of Justice or other authorized investigatory authority requests a suspension to avoid a conflict with an ongoing criminal investigation;

c. When the government can demonstrate that there is a real possibility that fraud exists which is of such a nature as to effectively preclude the board from ascertaining the facts and circumstances surrounding a claim; and

d. When an appellant so requests to avoid compromising his rights in regard to an actual or potential proceeding. See Fidelity Constr., 80-2 BCA ¶ 14,819 at 73,142.

C. Fraud as an Affirmative Defense.

1. Most often, the government elects to treat fraud as a jurisdictional bar, and pursues the issue in a motion to dismiss.

2. When fraud is cited as an affirmative defense, the boards generally treat the issue consistent with cases where it is presented as a jurisdictional bar. See ORC, Inc. ASBCA No. 49693, 97-1 BCA ¶ 28,750.

VI. CONCLUSION.

CLAIMS INVOLVING FRAUD:
CONTRACTING OFFICER RESTRICTIONS

I. INTRODUCTION

II. PRIMARY RESTRICTIONS ON AUTHORITY

A. THE CONTRACT DISPUTES ACT

Section 605(a)

1. "The authority of this section shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another federal agency is specifically authorized to administer, settle, or determine."

This exclusionary language included:

(a) Claims falling under the CDA's anti-fraud provision, 41 U.S.C. 604.

Martin J. Simko Const., Inc. v. United States, 852 F.2d 540, 545 (Fed. Cir. 1988) ("Section 604 . . . was never intended to be within the purview of the CO."); Appeal of TDC Management Corp., Dkt. No. 1802; 90-1 BCA P 22,627 (October 25, 1989) (CO has no authority to issue a decision setting forth a government claim under section 604)

(b) False Claims Act (FCA) disputes and claims.

Martin J. Simko Const., Inc., 852 F.2d at 547-8.

2. "This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud."

"Agency head" includes their subordinate contracting officers. United States v. United Technologies Corp., No. 5:92-CV-375 (EBB), 1996 U.S. Dist. LEXIS 17398 (D. Conn. October 11, 1996).

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B. THE FEDERAL ACQUISITION REGULATIONS (FAR)

1. FAR 33.210

"The authority to decide or resolve claims does not extend to-- . . . (b) The settlement, compromise, payment or adjustment of any claim involving fraud."

NOTE: FAR 33.210 "interprets [§ 605(a)] and admonishes the CO not 'to decide or settle . . . claims arising under or relating to a contract subject to the [CDA].'" Medina Const., Ltd. V. United States, 43 Fed. Cl. 537, 549 n.11 (1999).

2. FAR 49.106

"If the TCO suspects fraud or other criminal conduct related to the settlement of a terminated contract, the TCO shall discontinue negotiations and report the facts under agency procedures."

C. DEPARTMENT OF JUSTICE LITIGATION AUTHORITY

1. 28 U.S.C. 516

"Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."

2. Executive Order 6166 (June 10, 1933)

"As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice."

3. Triggering Event

"Pending" litigation. Hughes Aircraft Co. v. United States, 534 F.2d 889 (1976).

"Litigation becomes pending upon the filing of a complaint with the court." Ervin And Assoc., Inc. v. United States, 44 Fed. Cl. 646, 654 (1999).

4. Effect On A Contracting Officer

Divests the CO "of any authority to rule on the claim." Ervin & Assoc., 44 Fed. Cl. at 654.

CO may not issue a final decision on the claim. Case, Inc. v. United states, 88 F.3d 1004 (Fed. Cir. 1996).

CO "lacks jurisdiction to render a decision on the same claim." Johnson Controls World Services, Inc. v. United States, 43 Fed. Cl. 506, 510 (1999).

CO may not "act in the matter." Medina Const. Ltd v. United states, 43 Fed. Cl. 537, 552 (1999).

III. DEFINITIONAL ISSUES

A. WHEN DOES THE CLAIM INVOLVE FRAUD IN ORDER TO TRIGGER 41 U.S.C. 605(a)/FAR 33.210(b)?

1. During An Ongoing Investigation

Medina Const., Inc., 43 Fed. Cl. at 550.

2. Possibly As Early As When Fraud Is First "Suspected."

See UMC Elec. Co. v. United States, 45 Fed. Cl. 507, 509 (1999), aff'd 249 F.3d 1337 (Fed. Cir. 2001); Medina Const., 43 Fed. Cl. at 555; FAR 49.106.

B. HOW FAR DOES SETTLING, COMPROMISING, ADJUSTING EXTEND?

1. Synonymous With "Decide," "Resolve," "Adjudicate," "Determine," Etc.

UMC Elec. Co., 45 Fed. Cl. at 509 (CO without authority to "determine" fraud); Medina Const., 43 Fed. Cl. at 549 n.11 ("CO not 'to decide or settle . . . .'"); United States v. United Technologies Corp., 2000 Dist. LEXIS 6219 (Contracting agency may not "consider or resolve" fraud); TDC Mgmt. Corp., 1989 DOT BCA LEXIS 26 (CO cannot make fraud determinations).

2. "Compromise" probably does not extend to actions that would undermine the litigation.

C. WHAT IS THE CLAIM?

1. FCA: very broad definition of a claim

   "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729.

2. CDA: claim not defined, relies on FAR 33.201's claim definition.

3. PROBLEM: FAR 33.201 purports to define a claim for purposes of FAR 33.210(b)

-Routine Request For Payment:	CDA-No	FCA-Yes
-Uncertified Claims Over $100,000:	CDA-No	FCA-Yes

IV. REOCCURING FACTUAL SCENARIOS

1. Can A CO Determine Whether Fraud Exists?

   NO: UMC Elec. Co., 45 Fed. Cl. at 509; United States Catridge Co., 78 F. Supp. at 83; TDC Mgmt. Corp., 1989 DOT BCA LEXIS 26.

2. After DOJ Declines, Can The CO Resolve The Claim Involving Fraud?

   (a) NOT during an ongoing investigation. Medina Const., 43 Fed. Cl. at 550.

   (b) NOT if the agents end the investigation with a finding of fraud. 41 U.S.C. 605(a); FAR 33.210(b).

   (c) PROBABLY if DOJ determines no fraud exists (rare).

3. What Are The CO's Potential Options, if DOJ Declines But The Agents Find Fraud?

   (a) Have DOJ "Bless" The Contract Action/Resolution?

   -DOJ technically compromising claim? (Recommended)

   (b) Agency "Reevaluates" Their Fraud Determination?

   -What if DOJ later wants to plead fraud?

   -Why are we really changing our mind?

   (c) CO/Agency Moves Forward Unilaterally?

   -acting ultra vires?

   -CO final decision invalid?

NOTE: "A contracting officer's final decision is invalid when the contracting officer lacked authority to issue it." Case, Inc. v. U.S., 88 F.3d 1004, 1009 (Fed. Cir. 1996).

Further, "an invalid final contracting officer's decision may not serve as the basis for a CDA action." Id.

If the CO lacked authority to issue a final decision, "there can be no valid deemed denial of the claim . . . ." Id.

V. CONCLUSION

FISCAL ISSUES IN PROCUREMENT FRAUD

I. INTRODUCTION

II. THE MISCELLANEOUS RECEIPTS STATUTE

Requirement To Return Money To The Treasury

The Miscellaneous Receipts Statute (MRS), 31 U.S.C. 3302, requires that all funds received on behalf of the United states be deposited in the general fund of the U.S. Treasury. Specifically, the MRS provides: "an official or agent of the Government receiving money from the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. 3302(b).

MRS applies to "money from the Government *from any source* . . . [t]he original source of the money—whether from private parties or the government—is thus irrelevant." SATO v. DOD, 87 F.3d 1356, 1362 (D.C. Cir. 1996) (emphasis in original).

Improper obligation and expenditure of such monies constitutes an illegal augmentation of an agency's appropriated funds. Security Exchange commission—retention of Rebate Resulting From Participation in Energy Savings Program, B-265734, 1996 U.S. Comp. Gen. LEXIS 82 (Feb. 13, 1996), at * 4.

III. EXCEPTIONS

A. There are two broad classes of exceptions.

a. First, collections may be credited to a specific appropriation, rather than to miscellaneous receipts, when expressly authorized by statute. See, e.g. 57 Comp. Gen. 674, 685-86 (1978).

b. Second, collections may be credited to an appropriation when they represent refunds or repayments of amounts which were improperly or erroneously paid from that appropriation.. E.g. 61 Comp. Gen. 537 (1982)

B. Applies Only To The Receipt Of Money

1. Not applicable to agency receipt of goods or services. Bureau of Alcohol, Tobacco, and Firearms – Augmentation of Appropriations – Replacement

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of Autos By Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (July 12, 1988).

2. Even if money could have been obtained. ATF, supra.

3. No offset required. ATF, supra (Receipt of goods or services does not require an "offsetting transfer from current appropriations to miscellaneous receipts.").

C. Money Received Qualifies As A "REFUND."

Refunds are defined as "returns of advances, collections for overpayments, adjustments for previous amounts disbursed, or recovery of erroneous disbursements from appropriations or fund accounts that are directly related to, and are reductions of, previously recorded payments from the accounts." Tennessee Valley Authority—False Claims Act Recoveries, B-281064 (Feb. 14, 2000).

1. Civil False Claims Act

   TVA, supra (Recovery of single (actual) damages and investigative costs directly related to the false claim permitted; by award or settlement)

   FEMA, supra (FCA settlement; FEMA may retain as a refund single damages, interest on the principle amount of false claims paid, and administrative expenses of investigation).

2. Replacement Contracts

   Bureau of Prisons—Dispositions of Funds Paid in Settlement of Breach of Contract Action, B-210160, 62 Comp. Gen. 678 (Sept. 28, 1983) (Excess reprocurement costs may be used by agency to fund a replacement contract).

   Army Corps of Engineers - - Disposition of Funds Collected in Settlement of Faulty Design Dispute, B-220210, 65 Comp. Gen. 838; 1986 U.S. Comp. Gen. LEXIS 584 (Sept. 8, 1986), at *5-6 (Excess reprocurement costs, obtained as a result of contractor default or defective workmanship, may fund a replacement contract).

   National Park Service—Disposition of Performance Bond Forefeited To Government by Defaulting Contractor, B-216688, 64 Comp. Gen. LEXIS 625, at * 6 (June 20, 1985) (Proceeds of performance bond forfeited by contractor may be used by agency to fund replacement contract).

3. Negotiated Contract Resolutions

Securities and Exchange Commission – Reduction of Obligation of Appropriated Funds Due to a Sublease, B-265727 (July 19, 1996) (Contract adjustments or price renegotiations may be treated as refunds when the refund reflects "a change in the amount the government owed its contractor based on the contractor's performance or a change in the government's requirements.")

IV. LIMITATIONS

A. Penalties

Not considered refunds and must be deposited as miscellaneous receipts absent statutory authority to retain. TVA, supra.

B. Replacement Contracts

1. Refunds are credited to the appropriation or fund charged with the original expenditure and replacement contracts are funded only out of that appropriation. Department of Interior-Disposition of Liquidated Damages Collected for delayed Performance, B-242274, 1991 U.S. Comp. Gen. LEXIS 1072 (Aug. 17, 1991) at * 3.

2. There must exist a continuing bona fide need for goods or services covered by the original contract. Department of Interior, supra at *4.

3. The replacement contract must be the same size and scope as the original contract. Department of Interior, supra at *4; Bureau of Prisons, supra (Excess reprocurement costs may only be used to procure those goods and services that would have been provided under the original, breached contract).

C. "Closed" Appropriation Accounts [Grave Yard Dead]

Appropriation Accounting—Refunds And Collectibles, B-257905, 96-1 Comp. Gen. Proc. Dec. ¶130; 1995 U.S. Comp. Gen. LEXIS 821 (Dec. 26, 1995) at * 2 (If the appropriation account is closed, any recoveries go to the general fund of the Treasury).

D. Program Fraud Civil Remedies Act (PFCRA) Cases, 31 U.S.C. 3801-11

All recoveries returned to Treasury.

V. CONCLUSION

ADMINISTRATIVE REMEDIES: SUSPENSION AND DEBARMENT

TABLE OF CONTENTS

ADMINISTRATIVE REMEDIES: SUSPENSION AND DEBARMENT

"Debarment reduces the risk of harm to the system by eliminating the source of the risk, that is, the unethical or incompetent contractor."

Caiola v. Carroll, 851 F.2d 395, 398 (D.C. Cir. 1988)

"The way in which the Federal Acquisition Regulation is currently enforced gives large contractors an unfair advantage over smaller contractors. The companies that are suspended or debarred are nearly exclusively small contractors, as can be seen on the General Service Administration's List of Parties Excluded from Federal Procurement and Nonprocurement Programs ("GSA List"). One reason is that larger contractors have the financial means, plus high-priced attorneys, that enable them to work with the government on an alternative to suspension or debarment."

POGO Investigative Report: "Federal Contractor Misconduct:
Failures of the Suspension and Debarment System" (May 2002)

"Suppose last month you received a show cause letter from the contracting officer demanding that you advise her why she should not terminate your company for default for lack of progress. This month's letter is even worse. You receive by certified mail, return receipt requested, a letter from the contracting officer suspending your company from doing business with the agency. It seems that the agency thinks someone in your company stole government stock footage and used it in a commercial training film. Welcome to the twilight zone, the world of suspension and debarment. You will have more at stake with fewer rights or protections than in any other area of federal procurement. By the time its over, you will feel as if you've lived through the Spanish Inquisition, or at least the Star Chamber."

"Government Video Presents Selling to the Feds.com"
http://www.sellingtothefeds.com/t66.html

I. INTRODUCTION AND OVERVIEW.

A. Policy. Protection of the Government's interest in contracting only with responsible contractors and not for purposes of punishment.

B. Historical Background. Development of statutory and administrative debarments, the common rule, reciprocity, and policy/rulemaking groups.

C. Regulatory framework for suspension and debarment, scope and effect.

D. Due process required before denying or limiting a property or liberty interest.

E. Effect of suspension or debarment on subsequent criminal prosecution.

F. Trends. Renewed public interest in the suspension and debarment process, continued aggressive agency use of suspension and debarment, legislative initiatives, impact of acquisition reform, impact of rapid spending/contracting in support of the Global War On Terror, parallel proceedings.

G. Miscellaneous issues. Lead agency, bankruptcy, waiver of suspension and debarment in plea agreements, term of suspension / debarment, administrative compliance agreements, and show cause letters.

II. POLICY BASIS FOR SUSPENSION AND DEBARMENT.

A. Responsible Contractors, FAR 9.104-1. The underlying policy is that agencies may only contract with responsible contractors. FAR 9.402(a). Suspensions and debarments are discretionary measures that help to effectuate this policy. Id. Accordingly, the "[t]est for whether debarment is warranted is the present responsibility of the contractor." Delta Rocky Mountain Petroleum, Inc. v. Dep't of Defense, 726 F. Supp. 278, 280 (D. Colo. 1989). *See also* IMCO, Inc., v. United States, 33 Fed. Cl. 312 (Fed. Cl. 1995) ("The concept of "present responsibility" encompasses the contractor's ability to successfully perform a contract.")

B. Protection of Government's Interest – Not Punishment. Agencies may impose these remedies only to protect the Government and not to punish the contractor. FAR 9.402(b).

1. The debarment sanction is a nonpunitive means of ensuring compliance with statutory goals. Janik Paving & Constr. v. Brock, 828 F.2d 84, 91 (2d Cir. 1987).

2. These nonpunitive measures are justified because "[t]he security of the United States, and thus of the general public, depends upon the quality and reliability of items supplied by . . . contractors." Caiola v. Carroll, 851 F.2d 395, 398 (D.C. Cir. 1988).

III. HISTORICAL BACKGROUND.

A. Early Cases.

1. Debarment is a reasonable tool to protect the Government, but some administrative due process is necessary to assure a fair outcome. Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964).

2. Government may suspend a contractor without prior notice, but must grant a swift post-deprivation opportunity to be heard. Horne Bros. v. Laird, 463 F.2d 1268 (D.C. Cir. 1972).

B. 1980s - 1990s.

1. Courts generally uphold debarment decisions. Arbitrary and capricious standard of review. IMCO, Inc. v. United States, 33 Fed. Cl. 312, 316-17 (Fed. Cl. 1995).

2. Congress and Executive Branch attach debarment "triggers" to various laws:

a. Buy American, Davis Bacon, Walsh-Healey, Service Contract, Drug Free Workplace, and Clean Air/Clean Water Acts.

b. Immigration and Nationality Act Employment Provisions. Exec. Order No. 12,989.

c. Unfair Trade Practices. Statutes cited in FAR 9.403.

3. Ineligibility Provisions. Congress has included "ineligibility" provisions in various laws. Executive orders and initiatives also expand subject area of ineligibility determinations.

a. Military Recruiters on Campus. 10 U.S.C. § 983; Defense Federal Acquisition Regulation Supplement (DFARS) 209.470. Universities prohibiting military recruitment on campus are prohibited from receiving federal contracts and grants and will be placed on the GSA List. DFARS 209.470-3 (Procedures) and DFARS 252.209-7005 (contract clause). Universities with subordinate institutions of higher education ("subelements," e.g., law schools) that prohibit senior ROTC or military recruiting on campus shall be debarred.

b. Terrorist Countries Can Only Have Small Contracts. Pursuant to 10 U.S.C. § 2327, SECDEF shall develop and

maintain a list of all firms and subsidiaries of firms that are not eligible for defense contracts due to ownership or control of the firm by a terrorist country. This prohibition does not apply to prime contracts at less than $100,000. 10 U.S.C. § 2327(f)(1). Contracting officers shall not consent to any subcontract with a firm owned by the government of a terrorist country unless the agency head determines there is a compelling reason. DFARS 209.405-2.

c. MOH Counterfeiters. Section 8118 of the FY99 Department of Defense Appropriations Act, P.L. 105-262, permanently prohibits the use of DOD appropriated funds, or other funds available to contracting officers, to award a contract to, extend a contract with, or approve the award of a subcontract to any person who within the preceding 15 years has been convicted under 18 U.S.C. § 704 of the unauthorized manufacture or sale of the Congressional Medal of Honor. DFARS 209.471.

d. Child Labor. Exec. Order No. 13,126 (June 12, 1999) restricts the Government's purchase of goods made by forced or indentured child labor. The head of an agency may terminate a contract or suspend or debar a contractor that has furnished products made by forced or indentured child labor. FAR Subpart 22.15.

4. Administrative Debarments.

a. Procurement. Federal Acquisition Regulation (FAR), Subpart 9.4; DFARS 209.4; Army Federal Acquisition Regulation Supplement (AFARS) 9.4; other agency supplements.

b. Nonprocurement. (i.e., grants, cooperative agreements, other transaction agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for a specified use, and any other nonprocurement transactions between a Federal agency and a person).

(1) Debarment from federal assistance programs grants, loans, loan guarantees, etc., under Government-wide "Nonprocurement Common Rule" (NCR) at 32 C.F.R. Part 25 (Governmentwide Debarment and Suspension (Nonprocurement), and Requirements for Drug-Free Workplace (Grants)) See 68 Fed. Reg.

66534 (2003) for final rule implementing changes to the nonprocurement common rule.

(2) How different from procurement debarments under the FAR?

A company *proposed* for debarment under the NCR is not immediately excluded from Government contracts unless the company was previously suspended. A company proposed for debarment under the FAR is immediately excluded. Also, difference in flow-down: procurement debarment flows down at most to first tier subcontractors, while nonprocurement debarment flows down to every tier affected by federal money.

C. Reciprocity Between Procurement and Nonprocurement. Debarment under either the FAR or Common Rule results in ineligibility for both contracting and federal assistance programs. Exec. Order No. 12,689 (1989), 32 C.F.R. §25.110(c). *See also* 68 Fed. Reg. 66534 (2003).

D. Government and Private Bar Groups' Impact on Policy/ Rulemaking.

1. Debarment, Suspension and Business Ethics Committee (DSBEC). One of 20 standing committees that report directly to the DAR Council. Membership comprised of Army, Navy, Air Force, Defense Logistics Agency, General Services Administration, National Aeronautics and Space Administration, Department of Interior, Small Business Administration, and the Department of Veteran's Affairs. Rotating chair (three-year term) appointed by Director, Defense Procurement.

2. Interagency Suspension and Debarment Coordinating Committee (ISDC): a non-chartered committee chaired by EPA. Membership is comprised of 33 individual agency representatives of the Executive Branch. Coordinates policy, practices, lead agency, and sharing of information regarding various issues related to suspension and debarment. Serves as an advisory base for the Office of Management and Budget to examine possible changes in suspension and debarment.

3. American Bar Association, Section of Public Contract Law, Committee on Suspension and Debarment. Consists of a Chair, Vice-Chairs, and committee members from the Government and private bar. Studies, discusses, and issues advisory opinions on suspension and debarment issues. The Section publishes a

deskbook on suspension and debarment, “The Practitioner’s Guide to Suspension and Debarment” (updated in 2002).

E. COFC Issues a Troubling Demand for Consistency. The Court of Federal Claims (COFC) set aside a U.S. Department of Agriculture (USDA) procurement suspension decision. The court ruled that the contracting activity’s actions towards the contractor had been so logically inconsistent with the suspension that the action of the Suspension and Debarment Official (SDO) was arbitrary and capricious. The USDA had awarded a series of relatively small contracts to a firm during a period when the USDA had evidence that the firm had been dishonest in its prior dealings with the agency. The COFC held, in essence, that the USDA was arbitrary and capricious in later suspending the firm from federal contracting when it was competing for the award of much larger raisin contracts. Lion Raisin, Inc. v. United States 51 Fed. Cl. 238 (Fed. Cl. 2001).

IV. SUSPENSION.

A. Suspension is an action taken by a suspending official under FAR 9.407 to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting. FAR 2.101.

B. Causes for Suspension. FAR 9.407-2 provides that a suspending official may suspend a contractor upon “adequate evidence” of any of the following:

1. Commission of fraud or a criminal offense in connection with: (a) obtaining, (b) attempting to obtain, or (c) performing a public contract or subcontract;

2. Violation of Federal or State antitrust statutes relating to the submission of offers;

3. Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;

4. Violations of the Drug-Free Workplace Act of 1988 (Pub. L. No.100-690);

5. Intentionally affixing a label bearing a “Made in America” inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States, when the product was not made in

the United States (see section 202 of the Defense Production Act (Pub. L. No. 102-558));

6. Commission of an unfair trade practice as defined in FAR 9.403;

7. Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor; or,

8. Any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

C. Standard of Proof for Suspension: Adequate evidence.

1. Suspensions must be based on adequate evidence and not mere accusations. Horne Bros., Inc. v. Laird, 463 F.2d 1268, 1271 (D.C. Cir. 1972).

2. The FAR defines "adequate evidence" as information sufficient to support the reasonable belief that a particular act or omission has occurred. FAR 2.101.

3. "Adequate evidence" has been compared to that which is required to find probable cause sufficient to support an arrest or a search warrant. Transco Security, Inc. v. Freeman, 639 F.2d 318, 324 (6th Cir. 1981). Decision to suspend may be made without notice to the contractor but must include enough information for a meaningful response. Id.

4. An indictment for any of the causes listed in paragraph B, 1-7 above is "adequate evidence" for suspension. FAR 9.407-2(b). *See also* FAR 9.403 (an information or other filing charging a criminal offense is given same effect as indictment).

5. Suspension based on an indictment does not violate the presumption of innocence; agency would be irresponsible not to suspend a contractor indicted for procurement fraud. James A. Merritt & Sons, Inc. v. Marsh, 791 F.2d 328, 331 (4th Cir. 1986).

6. Allegations in a civil complaint may be "adequate evidence" to suspend a contractor, where the complaint is sufficiently detailed in information to enable suspending official to conclude it reasonable that the United States Attorney had compiled evidence supporting or corroborating the allegations, hence providing adequate

evidence. All Seasons Construction, Inc., et al. v. The Secretary of the Air Force, Civ. Action No. 05-1187 (W.D. La. 1995).

D. Immediate Action Required. A legal basis for suspension is not enough to justify suspension. Suspension is appropriate only when, "it has been determined that immediate action is necessary to protect the Government's interest." FAR 9.407-1(b)(1).

E. Period of Suspension. FAR 9.407-4.

1. A suspension is a temporary measure imposed pending the completion of an investigation or legal proceeding. FAR 9.407-4(a). However, upon initiation of "legal proceedings," suspension is indefinite until proceedings are completed or terminated by the suspending official. In such cases, suspensions exceeding three years have been upheld. Frequency Elecs., Inc. v. United States Dep't of the Air Force, 1998 U.S. App. LEXIS 14888, 42 Cont. Cas. Fed. (CCH) ¶ 77330 (4th Cir. Va. July 1, 1998).

2. General Rule. The period of suspension should not exceed 12 months if legal proceedings are not instituted within 12 months after the date of the suspension notice. The Department of Justice can request an extension of up to six additional months where no legal proceedings have been initiated. (The suspension may not exceed a total of 18 months unless legal proceedings have been instituted within that period.) FAR 9.407-4(b).

V. DEBARMENT.

A. Debarment. Action taken by a debarring official under FAR 9.406 to exclude a contractor from Government contracting and Government-approved subcontracting for a reasonable specified period. FAR 2.101.

B. Causes for Debarment. FAR 9.406-2.

1. The debarring official may debar a contractor for a conviction of or a civil judgment pursuant to FAR 9.406-2(a) for the following:

a. Commission of fraud or a criminal offense in connection with: (1) obtaining, (2) attempting to obtain, or (3) performing a public contract or subcontract;

b. Violation of Federal or State antitrust statutes relating to the submission of offers;

c. Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;

d. Intentionally affixing a label bearing “Made in America” inscription (or any inscription having the same meaning) to a product sold or shipped to the United States, when the product was not made in the United States (see Section 202 of the Defense Production Act (Pub. L. No. 102-558)); or

e. Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

2. Under FAR 9.406-2(b), a debarring official may also debar a contractor based upon a “preponderance of the evidence” for the following:

a. Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as:

(1) Willful failure to perform in accordance with the terms of one or more contracts; or

(2) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.

b. Violation of the Drug-Free Workplace Act of 1988 (Pub. L. No. 100-690); or

c. Intentionally affixing a label bearing a “Made in America” inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States, when the product was not made in the United States (see Section 202 of the Defense Production Act (Pub. L. No. 102-558)) (Note: DFARS 209.406-2 requires a determination regarding debarment upon conviction of 10 U.S.C. § 2410f within 90 days of conviction. A determination not to debar requires a report to the Director of Defense Procurement, who will notify Congress within 30 days.);

d. Commission of an unfair trade practice as defined in FAR 9.403;

e. Attorney General Determination – violation of Immigration and Nationality Act employment provisions (see EO No. 12989).

3. Under FAR 9.406-2(c), a contractor may be debarred for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

C. Debarment Criteria/Guidance.

1. Standard of proof for debarment is a preponderance of the evidence, which is proof that, compared with information opposing it, leads to the conclusion that the fact in issue is more probably true than not. FAR 2.101.

2. The mere existence of grounds for debarment does not mean that the debarring official must debar the contractor. Rich-Sea Pak Corp. v. Janet Cook, CV293-44 (S.D. Ga. 1993).

3. The debarring official should consider the seriousness of the offense and any remedial measures or mitigating factors. FAR 9.406-1(a). *See* Silverman v. United States Defense Logistics Agency, 817 F. Supp. 846 (S.D. Cal. 1993) (imposition of three year debarment arbitrary and capricious where debarring official failed to consider mitigating factors). Mitigating factors listed at FAR 9.406-1(a) are:

a. Existence of standards of conduct and internal controls at the time of the misconduct;

b. Disclosure of the misconduct to the Government;

c. Extent of contractor investigation;

d. Contractor cooperation in the Government's investigation;

e. Contractor payment of civil and criminal fines and restitution;

f. Implementation of disciplinary measures against wrongdoers;

g. Implementation of remedial measures;

h. Agreement by contractor to revise standards of conduct and internal controls;

i. Amount of time contractor has to repair his organization; and

j. Contractor's management understands the seriousness of the misconduct and has implemented programs to prevent recurrence.

4. Remedial measures must be adequate to convince the debarring official that the Government's interests are not at risk; the Government has broad discretion in ensuring the present responsibility of the contractor such that the remedial measures taken by the contractor adequately protect the Government's interests. Robinson v. Cheney, 876 F.2d 152, 160-61 (D.C. Cir. 1989).

5. Aggravating Factors. Although the FAR does not list aggravating factors, some facts which bear directly on the present responsibility of the contractor are: (a) severity of the wrongdoing; (b) frequency and duration of the misconduct; (c) pattern or prior history of wrongdoing; (d) failure to accept responsibility for the misconduct; (e) positions of the individuals involved; (f) pervasiveness of the wrongdoing in the organization, and (g) failure to take complete corrective action.

D. Period of Debarment. FAR 9.406-4.

1. General Rule. Debarment should be for a period commensurate with the seriousness of the offense. Generally, this period should not exceed three years, considering any periods of suspension with several exceptions:

a. Drug-Free Workplace Act. A violation of the Drug-Free Workplace Act may result in a debarment of up to five years. FAR 9.406-4(a)(1)(i).

b. Debarments based on Attorney General determinations of lack of compliance with the Immigration and Nationality Act employment provisions (FAR 9.406-2(b)(2)) shall be for one year. FAR 9.406-4(a)(1)(ii).

2. Three years is not an absolute limit. Although the FAR sets three years as the general upper limit, the regulations do not prohibit an agency from debarring a contractor for a period greater than three years, providing a reasonable explanation for the extended period is provided. Coccia v. Defense Logistics Agency, 1992 U. S. Dist. LEXIS 17386 (E.D. Pa. 1992) (upholding a 15-year debarment).

3. The period of debarment may be extended if the extension is necessary to protect the interests of the Government; however, the extension cannot be based solely on the grounds supporting the original period. FAR 9.406-4(b). Court upheld extension of debarment period based on conviction for actions similar to those leading to fact-based debarment. Conviction was "new fact or circumstance." Wellham v. Cheney, 934 F. 2d 305, 309 (11th Cir. 1991).

4. The debarring official may also reduce the period of debarment. FAR 9.406-4(c).

VI. SCOPE OF SUSPENSION AND DEBARMENT.

A. Organizational Elements. Normally extends to all divisions or other organizational elements of a contractor unless the debarment decision is limited by its terms. FAR 9.406-1(b) and 9.407-5.

B. Affiliates.

1. Business concerns, organizations, or individuals where one either controls or has the power to control the other; or a third party controls or has the power to control both. FAR 2.101.

2. Must be specifically named, given written notice, and offered an opportunity to respond. FAR 9.406-1(b) and 9.407-1(c).

3. Indicia of control include interlocking management or ownership, identity of interests among family members. ALB Industries, 61 Comp. Gen. 553, B-207335 (1982) (shared facilities and equipment and common use of employees).

4. "New Company." A business entity organized following the suspension, debarment, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the ineligible contractor. Howema Bau-Gmbh, B-245356, 91-2 CPD 214 (1991).

C. Imputation.

1. The fraudulent, criminal, or other seriously improper conduct of an individual may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the

benefit derived from the conduct is evidence of such knowledge, approval, or acquiescence. FAR 9.406-5(a) and 9.407-5.

2. Likewise, the misconduct of the contractor may be imputed to an individual within the organization upon a showing that the individual "participated in, knew of, or had reason to know of the contractor's conduct." FAR 9.406-5(b) and 9.407-5. "Should have known" is not sufficient to meet the requirement. Determination must be based on information actually available to the individual. Novicki v. Cook, 946 F.2d 938 (D.C. Cir. 1991).

VII. PUBLICATION / EFFECT OF A SUSPENSION OR DEBARMENT.

A. Consolidated List of Contractors Debarred, Suspended, and Proposed for Debarment. The General Services Administration (GSA) maintains a consolidated list of all contractors debarred, suspended, and proposed for debarment. FAR 9.404.

B. Web Site: Excluded Parties List System. The GSA List of Parties Excluded from Federal Procurement and Nonprocurement Programs is available at http://www.arnet.gov/epls. The web site is updated daily and is accessible free of charge.

C. Government-Wide Exclusion. Agencies will not solicit offers from, award contracts to, renew or extend existing contracts with, or consent to subcontracts with contractors suspended, proposed for debarment, or debarred, unless the acquiring agency's head or designee determines in writing that there is a compelling reason to do so. FAR 9.405(b). In the Army, the debarring official makes that determination. AFARS 5109.405(a).

D. Additional Effects.

1. Exclusion from conducting business with the Government as representatives or agents of other contractors and from acting as individual sureties. FAR 9.405(c).

2. Exclusion from nonprocurement transactions with the Government such as grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements. E.O. 12549.

3. Restrictions on subcontracting. FAR 9.405-2.

a. Subcontracts subject to Government consent may only be approved/awarded if the agency head states in writing that there are compelling reasons to do so.

b. Contractors may not enter into subcontracts in excess of $25,000 with suspended, proposed for debarment, or debarred contractors, unless there is a compelling need.

E. Sales Contracts. Suspension from procurement contracts does not automatically suspend a contractor from sales contracts (contracts to buy items from the Government). Alamo Aircraft Supply, B-252117, Jun. 7, 1993, 93-1 CPD 436. The DLA Special Assistant for Contracting Integrity is the exclusive representative of the Secretary of Defense to suspend and debar contractors from the purchase of federal personal property. DFARS 209.403 (3).

F. Continuation of Current Contracts.

1. Agencies may continue with current contracts or subcontracts despite suspension, the proposed debarment, or debarment of a contractor. FAR 9.405-1(a). Agencies are restricted, however, in their ability to place orders, exercise options, or otherwise extend duration without the written determination of compelling reasons. FAR 9.405-1(b).

2. IDIQ Contracts. If the contract's guaranteed minimum amount has been met or exceeded, no further orders may be placed against the contract. FAR 9.405-1(b); DFARS 209.405-1(b); *see also* Procurement Fraud Division Note, The Army Lawyer, Dec. 2001 at 35.

3. Contract Termination. Termination for default may be appropriate where fraud and termination involve same contract. Daff v. United States, 78 F. 3d 1566, 1573-74 (Fed. Cir. 1996) (fraud in performance of defaulted contract); Brown Constr. Trades, Inc. v. United States, 23 Cl. Ct. 214, 216 (1991) (fraud involving the "very contract" that was terminated for default); Morton v. United States 757 F.2d 1273 (Fed. Cir. 1985) (default termination of a "large, sophisticated contract" sustained based on fraud involving a single change order). However, where contractor misconduct and debarment involves another contract, default termination of unrelated contract likely not appropriate. Giuliani Assocs., Inc., ASBCA Nos. 51672, 52538, 2003-2 BCA ¶ 32,368.

VIII. DUE PROCESS.

A. *De Facto* Debarments. *De facto* debarments are not permitted.

1. An agency cannot simply refuse to contract with a contractor without providing the procedural safeguards afforded a contractor facing debarment. Art Metal-USA, Inc. v. Solomon, 473 F. Supp. 1, 5 (D.D.C. 1978). Agency actions that effectively exclude a contractor without these safeguards may constitute an impermissible de facto debarment. Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980) (Plaintiff sued defendant government after government rejected its bids on account of plaintiff's alleged lack of integrity. Plaintiff claimed it was denied due process because it was not notified of the charges against it and had no opportunity to respond. The district court rejected plaintiff's claims and entered judgment in favor of defendant. The court of appeals held that government's conduct injured a liberty interest of plaintiff; namely, plaintiff's right to be free from stigmatizing governmental defamation. As a result of government's conduct, plaintiff lost government employment and was foreclosed from other employment opportunities.)

2. Repeated nonresponsibility determinations may constitute a *de facto* debarment; fair play requires that if an agency is going to debar a contractor, it must use the debarment procedures. Leslie & Elliot Co. v. Garrett, 732 F. Supp. 191, 197-98 (D.D.C. 1990). But see Cubic Corp. v. Cheney, 914 F.2d 501 (D.C. Cir. 1990) (nonresponsibility determination is not the equivalent of a suspension if it is based on the contractor's lack of integrity).

3. Government may not maintain a list of contractors that it deems not to have complied with a law, regulation, or executive order unless the contractors have been afforded due process prior to placement on the list. Such practice is tantamount to debarment. Illinois Tool Works v. Marshall, 601 F.2d 943 (7th Cir. 1979).

4. Intent: the Key Issue. *De facto* debarment occurs when the government uses nonresponsibility determinations as a means of excluding a firm from government contracting or subcontracting, rather than following the debarment regulations and procedures set forth at FAR Subpart 9.4. A necessary element of a *de facto* debarment is that an agency intends not to do business with the firm in the future. Quality Trust, Inc., B-289445, 2002 U.S. Comp. Gen. LEXIS 21.

B. Procedural Due Process. *See generally* DFARS, Appendix H.

1. Notice.

a. The contractor is provided written notice of the proposed action. A copy of the administrative record usually accompanies the notice. FAR 9.406-3(c).

b. The contractor has 30 days within which to submit in person, or in writing, opposition to the action. FAR 9.406-3(c)(4).

2. Debarring Officials. DFARS 209.403.

a. Army. Commander, U.S. Army Legal Services Agency is the primary "debarring official" for Department of the Army. In addition, AFARS 5109.403 provides that the Army has three overseas "debarring officials:" (1) Deputy Judge Advocate, U.S. Army Europe and Seventh Army; (2) Staff Judge Advocate, U.S. Army South; and (3) Staff Judge Advocate, U.S. Eighth Army.

b. Navy: General Counsel of the Navy.

c. Air Force: Deputy General Counsel (Contractor Responsibility).

d. Defense Logistics Agency: The Special Assistant for Contracting Integrity.

3. Nature of proceedings—two step debarment process:

a. Step 1: Presentation of matters in opposition.

b. Step 2: Fact finding procedure—occurs only when the contractor's presentation during Step 1 raises a genuine dispute over a material fact.

4. Presentation of Matters in Opposition. DFARS H-103.

a. Contractor submits, in writing or through a representative, information and argument in opposition to the proposed action, to include any information that may raise a material issue of fact. Written matters in opposition must be submitted within 30 days from receipt of notice of action. DFARS H-103(c).

b. In-person presentation. DFARS H-103(b).

(1) Informal meeting, non-adversarial in nature.

(2) SDO and/or agency representatives may ask questions.

c. Contractor may, within five days of submitting these matters, submit a written statement outlining the material facts in dispute, if any. DFARS H-103(a).

5. Fact-finding Proceeding. This is necessary if material facts are in dispute. DFARS H-104(a).

a. The SDO designates a fact-finder to conduct a fact-finding proceeding. DFARS H-104(a). Under Army practice, if the suspending and debarring official determines that there is a genuine dispute as to a material fact, he will appoint a military judge to conduct a hearing.

b. Procedures.

(1) Normally held within 45 working days of the presentation of matters in opposition. DFARS H-104(b).

(2) Government and contractor may appear in person and present evidence DFARS H-104(c).

(3) Federal Rules of Evidence and Civil Procedure do not apply. Hearsay may be presented. DFARS H-104(d).

(4) Live testimony is permitted. DFARS H-104(e).

c. The fact-finder will provide written findings of fact to the SDO. DFARS H-106(a). Standard of proof: preponderance of the evidence. DFARS H-106(b).

6. Notice of decision. The suspending and debarring official will notify the contractor of his decision promptly. DFARS H-106(d).

7. Review of Suspending and Debarring Official’s decision.

a. No agency review.

b. Judicial review. An agency's decision to debar a contractor is subject to review under the Administrative Procedures Act. Burke v. EPA, 127 F. Supp. 2d 235, 238 (D.D.C. 2001). The agency decision is subject to an arbitrary and capricious standard of review. Id.

c. Exhaustion of administrative remedies required before court will review administrative process. Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers, 714 F. 2d 163 (D.C. Cir. 1983). CONSPEC Marketing and Manufacturing Co., Inc. v. Gray, 1992 U.S. Dist. LEXIS 2845 (D. Kan. 1992).

d. APA Review limited to administrative record unless contractor can make a strong showing of government bad-faith or improper conduct in making the decision. Alabama-Tombigbee Rivers Coalition v. Norton, 2002 U.S. Dist. LEXIS 1769, Jan. 29, 2002.

IX. EFFECT ON A SUBSEQUENT CRIMINAL PROSECUTION.

A. Double Jeopardy Clause. The double jeopardy clause is not a bar to a later criminal prosecution because debarment sanction is civil and remedial in nature. The mere presence of a deterrence element is insufficient to render a sanction criminal, as deterrence "may serve civil as well as criminal goals." Hudson v. United States, 118 S. Ct. 488 (1997).

B. Debarment is a "Civil Proceeding," Not a Criminal Penalty. In United States v. Hatfield, 108 F.3d 67, 69-70 (4th Cir. 1997), the court concluded debarment is a "civil proceeding," not a criminal penalty.

X. TRENDS.

A. Aggressive Use of Suspension and Debarment. Agencies continue the aggressive use of suspension and debarment. See Steven A. Shaw, Suspension and Debarment: The First Line of Defense against Contractor Fraud and Abuse, *The Reporter,* Vol. 26, No. 1. Army pursues greater use of Administrative Compliance Agreements and tailored terms of debarments.

B. Enhanced Congressional interest regarding contractor ethics?

1. H.R. 1218, Contractor Responsibility: To require contractors with the Federal Government to possess a satisfactory record of integrity and business ethics.

2. H.R. 2767, Contractor Accountability Act: To Improve Federal agency oversight of contracts and to strengthen accountability of the Governmentwide debarment and suspension system.

3. H.R. 746: A bill to prohibit the Federal Government from entering into contracts with companies that do not include certification for certain financial reports required under the Securities Exchange Act of 1934.

4. S. 1072, Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2003: Part of the DOT Authorization Act (Sec. 307, "Contractor Suspension and Debarment Policy; Sharing Fraud Monetary Recoveries"); mandates mandatory debarment of anyone who is convicted of fraud on any projects involving highway trust funds, and mandatory suspension of anyone indicted for fraud, subject to the approval of the Attorney General of any contractor.

C. Impact of Acquisition Reform on Suspension and Debarment.

1. Acquisition Reform and Government oversight of contractors: what is the proper balance?

2. Emphasis on review of past performance raises "de facto debarment" concerns.

3. Some certification requirements eliminated by regulations implementing the Clinger-Cohen Act of 1996 (subcontractor kickbacks, negotiation representations, commercial item certifications).

4. Amendments to the Procurement Integrity Act, 41 U.S.C. § 423, eliminated procurement integrity certifications.

5. "Partnering with contractors" philosophy raises concerns of overlooking fraud.

D. GSA CODE FF: Restrictions on Employment of Contractors Convicted of Fraud under DOD contracts. It is unlawful for defense contractors to employ persons convicted of defense-contract related felonies. 10 U.S.C. § 2408. DFARS 203.570-2 implements that statute as follows:

(a) A contractor or subcontractor shall not knowingly allow a person, convicted after September 29, 1988, of fraud or any other felony arising out of a contract with the DoD, to serve-

(1) In a management or supervisory capacity on any DoD contract or first-tier subcontract;

(2) On its board of directors;

(3) As a consultant, agent, or representative; or

(4) In any capacity with the authority to influence, advise, or control the decisions of any DoD contractor or subcontractor with regard to any DoD contract or first-tier subcontract.

See also DFARS 252.203-7001.

E. DOJ "Parallel Proceedings Philosophy." Cases are evaluated from initiation for civil as well as criminal action. Encourages aggressive use of suspension and debarment remedy.

F. Progress Payment Fraud. A recent Sixth Circuit case illustrates difficulties in obtaining a conviction for progress payment fraud where the contractor has paid some, but not all, subcontractors. United States v. Gatewood, 173 F.3d 983 (6th Cir. 1999).

XI. MISCELLANEOUS ISSUES.

A. Lead Agency Determinations: "Yockey Memorandum," September 28, 1992. Agency with the predominant financial interest" will assume lead to debar. Subcontracting interests also considered. Issue: how do we determine predominant financial interest? Sheer dollar amounts; dollar amounts in current fiscal year, or over a period of time; "importance" of program?

B. Bankruptcy. Automatic stay provisions of the U.S. Bankruptcy Code do not prohibit suspension and debarment. Eddleman v. U.S. Dep't of Labor, 923 F.2d 782 (10th Cir. 1991) (DOL's pursuit of debarment was primarily to prevent unfair competition in the market by companies who pay substandard wages and thus a proper exercise of its police power and thus not subject to automatic stay).

C. Waiver of Suspension and Debarment Remedy in Plea Agreements. AUSAs have no authority to waive the remedy.

D. Show Cause Letters. Inquiries from agencies to contractors where there is insufficient evidence of misconduct to suspend or debar. Highly recommended by Yockey Memorandum: "[w]hen appropriate prior to suspension, I want companies to be informed that we have extremely serious concerns with their conduct, that their suspension is imminent and that they may contact the suspension official, or his designee, if they have any information to offer on their behalf."

XII. ADMINISTRATIVE COMPLIANCE AGREEMENTS.

A. Desired Preconditions.

1. Restitution.

2. Correction of the flawed procedures that resulted in the misconduct.

3. Discipline of blameworthy individuals.

4. Assurance that appropriate standards of ethics and integrity are in place and are working.

5. Otherwise satisfactory contract performance.

6. SDO is convinced that contractor is not so lacking in present responsibility as to threaten integrity of Government procurement.

B. Common Features.

1. Term of three years.

2. Company has installed an ethics code, government contracting policies and procedures, and other appropriate controls (quality control, internal audit, personnel background checks, etc.). Periodic training of employees.

3. Contractor-financed outside audits of the ethics process and other corrective action. Employment of ombudsman (external) and/or ethics director (internal).

4. Periodic reporting to debarring official.

5. Provision for compliance visit by enforcing agency.

6. Violation of the terms of the agreement is separate grounds for debarment.

7. Administrative fee to reimburse expenses associated with compliance visits.

8. Investigative cost reimbursement where substantiated and unusually high due to contractor lack of cooperation.

C. Interrelationship with *qui tam* cases: Ninth Circuit Muddies the Water. The relator filed a *qui tam* action against the corporation, his former employer, for submitting falsified records to the United States and failing to complete all required testing of flight data transmitters (FDTs). The United States intervened in the suit, settled it, and paid the relator his share of the recovery. The United States then prosecuted a criminal case based on the corporation's (1) false reporting, (2) incomplete testing, and (3) use of inadequate damping fluid in the FDTs. After that case ended, the relator filed another qui tam action based on the corporation's use of the inadequate damping fluid. The United States declined to intervene, and the corporation obtained dismissal of the second civil suit. The United States initiated a debarment proceeding against the corporation. After those two parties settled that proceeding, the relator sought a share of the cash payment promised as part of the settlement. The district court denied his motion for an order directing the United States to give him a share of those proceeds. The instant court reversed. The debarment proceeding was an "alternate remedy" within the meaning of 31 U.S.C. § 3730(c)(5). The court reversed and remanded for further proceedings. Further, the court noted that if the relator was entitled to receive a share of the settlement, he was entitled to a share of all the proceeds recovered, not just the cash portion of the settlement. United States *ex rel.* Barajas v. United States, 238 F.3d 1004 (9th Cir 2001).

XIII. SUSPENSION / DEBARMENT: SUMMARY AND CONCLUSION.

A. DOD agencies continue to use suspension and debarment as an effective fraud-fighting tool. Civilian agencies are increasingly interested in expanding the use of the remedy.

B. Legislative and Executive Branches continue to use suspension and debarment to enforce social policy.

C. Important to coordinate suspension and debarment actions among all agencies with interests due to reciprocal effects.

XIV. COORDINATION OF REMEDIES

A. References.

1. Department of Defense Directive 7050.5, Subject: Coordination of Remedies for Fraud and Corruption Related to Procurement Activities, 7 June 1989 [DOD Directive 7050.5].

2. Federal Acquisition Regulation (FAR), Subpart 9.4 – Debarment, Suspension, and Ineligibility.

3. Defense FAR Supplement (DFARS), Subpart 209.4 – Debarment, Suspension, and Ineligibility.

4. Defense Logistics Agency Regulation 5500.10, Subject: Combating Fraud in DLA Operations.

5. Army Regulation 27-40, Litigation, Chapter 8, Remedies in Procurement Fraud and Corruption, 19 September 1994 [AR 27-40].

6. SECNAV INSTRUCTION 5430.92B, Subject: Assignment of Responsibilities to Counteract Fraud, Waste, and Related Improprieties within the Department of the Navy.

7. Air Force Policy Directive 51-11, Subject: Coordination of Remedies for Fraud and Corruption Related to Air Force Procurement Matters, 21 October 1994.

8. Air Force Instruction 51-1101, Subject: The Air Force Procurement Fraud Remedies Program. 21 October 2003.

B. Introduction.

1. Agency regulations implement DOD Directive 7050.5. Copy found at Appendix D, AR 27-40.

2. The fraud mission established in DOD Directive 7050.5. Each of the DOD Components shall monitor, from its inception, all significant investigations of fraud to ensure all appropriate remedies are pursued expeditiously.

3. The “inception” of a fraud investigation.

4. DODIG oversight responsibility.

5. Determination of Lead Agency Responsibility. Interagency coordination is required in cases where the contractor has contracts with more than one federal agency. The DOD agency that has the predominant financial interest should be designated the "lead agency." Yockey Memorandum (Under Secretary of Defense, September 28, 1992). That agency has authority to suspend or debar the contractor. In the event of disputes among DOD agencies on this issue, the matter will be referred to the Director of Defense Procurement for resolution.

C. Remedies.

1. Criminal prosecution.

2. Civil litigation.

3. Contract remedies.

4. Administrative remedies.

5. Suspension and debarment.

6. Administrative settlement agreements.

D. Key Elements of the Army Procurement Fraud Program.

1. Procurement Fraud Branch (PFB) is single centralized organization within the Army to coordinate and monitor criminal, civil, contractual, and administrative remedies in significant cases of fraud or corruption relating to Army Procurement.

2. Fraud remedies coordination assures that commanders and their contracting officers take, in a timely manner, all applicable criminal, civil, contractual, and administrative remedies.

3. Decentralized responsibility upon the local commander for operational matters such as reporting and remedial action.

4. Continuous case monitoring by The Judge Advocate General's PFB from the time suspected fraud is first reported until final disposition.

5. Command-wide fraud awareness training.

E. PFB Management Responsibilities.

1. Coordinate disposition of, and monitor, Army contract fraud and corruption cases.

2. Coordinate remedies.

3. POC for receipt and dissemination of DOD safety alerts in fraud cases.

4. POC in Army for voluntary disclosure cases.

5. Maintain active liaison with USACIDC, DCIS, and other investigative agencies.

6. Coordinate with DOJ and United States Attorneys regarding significant civil and criminal procurement fraud cases.

F. MACOM and Subordinate Command Programs.

1. SJAs at MACOMs appoint a Procurement Fraud and Irregularities Coordinator (PFIC) for their command.

2. Chief Counsel and SJAs at Major Subordinate Commands with procurement advisory responsibility appoint an attorney as a Procurement Fraud Advisor (PFA) to manage the fraud program at their installations.

3. Reports/Recommendations transmitted through command channels to the PFIC for the affected MACOM.

4. PFAs and PFICs assure prompt notification of appropriate local CID or DCIS activities.

G. Procurement Fraud Advisors (PFAs): The Key To A successful Program.

1. Attorneys.

2. Qualifications -- Working knowledge of procurement, criminal, and civil litigation law, and familiarity with government agencies in the acquisition area.

H. PFA Tasks and Responsibilities.

1. Recognize the indicators of possible procurement fraud or irregularity and help identify potential cases.

2. Prepare Flash Reports (AR 27-40, para. 8-5b).

    a. Required for all cases if there is substantial indication of fraud and/or the matter is referred for investigation.

    b. Dispatch immediately to PFB and major command by fax. (PFB fax is (703) 696-1559).

3. Coordinate investigative and remedial actions at the installation/activity.

    a. Provide support to criminal investigators and coordinate remedies actions with them.

    b. Coordinate remedial actions and necessary participation by installation/activity personnel. Make sure that funds recovered in fraud recoveries that can be returned to the agency (rather than the U.S. Treasury) are credited to agency accounts, such as where contracts remain open. Obtain necessary fund citations and accounting classifications. Determine whether settlements can include return of products or services as well as money.

    c. Interface with local DOJ officials.

    d. Help identify and solve systemic or internal control breakdowns that may have contributed to problems.

4. Prepare comprehensive remedies plan (AR 27-40, para. 8-8).

    a. Should be prepared in close coordination with investigators and contracting officer but is PFA’s responsibility.

    b. Must consider all remedies.

    c. Must consider adverse impact and safety concerns. Should support preparation of a comprehensive victim impact statement (VIS).

    d. Forward VIS to PFB and the major command in significant cases.

e. Significant cases defined as cases involving:

(1) Loss greater than $100K;

(2) Top 100 DOD company;

(3) Bribery, gratuities, or conflict of interest; or

(4) Safety Issues.

5. Assist in preparation of necessary contracting officer's report (DFARS 9.406-3) and litigation reports (para. 8-9, AR 27-40).

6. Inform MACOM and PFB of initial contact with U.S. Attorney's Office or DOJ.

7. Acts as installation/activity central coordination point for fraud matters.

I. Features of Successful Installation Level Procurement Fraud Programs.

1. An effective working relationship between the criminal investigator, the PFA, and contract officers.

2. An aggressive approach that includes fraud awareness training and informational activity by the PFA.

3. An effective working relationship between the local U.S. Attorney's Office and the installation command counsel/staff judge advocate.

4. An active installation case management team and/or coordinating committee which both facilitates remedies coordination in individual cases and identifies and solves management/ internal controls weaknesses.

5. Command support.

XV. CONCLUSION.